UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AARON SIEGEL; JASON COOK; JOSEPH DELUCA; NICOLE CUOZZO; TIMOTHY VARGA; CHRISTOPHER STAMOS; KIM HENRY; and ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC.,	**CIVIL ACTION NUMBER:** **22-cv-7463-KMW-AMD** **MOTION HEARING FOR A TEMPORARY RESTRAINING ORDER AND CONSOLIDATION**

Plaintiffs,

v.

MATTHEW PLATKIN, in his official capacity as Attorney General of New Jersey; PATRICK J. CALLAHAN, in his official capacity as Superintendent of the New Jersey Division of State Police,

Defendants.

Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets
Camden, New Jersey 08101
January 12, 2023
Commencing at 1:36 p.m.

B E F O R E: **THE HONORABLE KAREN M. WILLIAMS, UNITED STATES DISTRICT JUDGE**

Sharon Ricci, Official Court Reporter
sharon.ricci.usdcnj@gmail.com
267-249-8780

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

A P P E A R A N C E S:

HARTMAN & WINNICKI, P.C.
BY: DANIEL L. SCHMUTTER, ESQUIRE
74 Passaic Street
Ridgewood, New Jersey 07450
For the Plaintiffs

OFFICE OF THE NEW JERSEY ATTORNEY GENERAL
BY: ANGELA CAI, ESQUIRE
JEREMY FEIGENBAUM, ESQUIRE
JEAN REILLY, ESQUIRE
25 Market Street
Trenton, New Jersey 08625
For the Defendants

(PROCEEDINGS held in open court before The Honorable Karen M. Williams, United States District Judge, at 1:36 p.m.)

THE COURTROOM DEPUTY: All rise.

THE COURT: Good afternoon. Everyone please be seated.

So the Court has the masking policy in place for all public spaces, which includes the courtroom. I will dispense with that requirement only while speaking and provided you keep safe distance and whoever you're closest to doesn't object. The reason for that is so that the court reporter can capture everyone's words clearly.

We're here this afternoon in the matter of Siegel vs. Platkin, Case No. 22-7463. We're here this afternoon for an emergency motion to consolidate, a motion for temporary restraining order and preliminary injunction.

Let me hear from the parties first on the motion to consolidate.

MS. CAI: Would you like to hear from the State first?

THE COURT: Yeah. And we can -- I can short circuit some of this because there's no disagreement that the case, in fact, should be consolidated; there seems to be a lack of agreement on which judge the case should go to.

And so I will hear from the parties on that because it is the first motion.

MS. CAI: Your Honor, do you prefer that I speak from

the podium or --

THE COURT: Wherever you're comfortable.

MS. CAI: I just wasn't expecting the microphone to be on the podium itself.

THE COURT: Oh, wait, did we enter appearances?

MR. SCHMUTTER: No.

THE COURT: Enter your appearances first, please.

MS. CAI: Yes, Your Honor. Angela Cai, Deputy Solicitor General for the State.

MR. SCHMUTTER: Good afternoon, Your Honor. Daniel Schmutter from the firm of Hartman & Winnicki for plaintiffs.

THE COURT: Okay.

MS. CAI: Your Honor, on the motion to consolidate, I do think that both the rules and the State's position are very clear, and I don't think that anything in Mr. Schmutter's letter from yesterday changes any of that. I will just emphasize a couple of things.

First, is that nothing about our motion or the arguments we're making turns on how this Court will rule on the merits or any of the issues or how any other Court rules. We filed this motion on December 23rd, as soon as we were informed that there were two cases pending on overlapping challenges. And it's consistent with our practice in other cases like these where people are challenging state policies, such as the Ocean County case we cited.

We filed for consolidation because all of the factors in FRCP 42 are met. At the time we moved, we did not know which TRO was going to be heard first, which judge was going to decide first, and of course, what the ruling would be. And that's the way it should be.

These natural rules of assignments such as those in Local Civil Rule 40.1 exist for a really important reason, and we see no reason to depart from those rules and, of course, also the longstanding practices of this Court.

And I would say that if there is no neutral or consistent rule like the one we already have, which is that consolidated cases and related cases go with the earlier docket number, I think the Court will see more frequently the type of approach that plaintiffs are taking here, which is, waiting to see how one Court rules, then saying we do want consolidation, manufacturing arguments for why one court versus the other should get consolidated cases. I think we should try to avoid all of that in how we deal with case assignments in general.

The second point is a very general one, which is that, you know, plaintiffs seem to focus on the TRO period, but we've always been looking at the full length of the case for consolidation. It would be consolidated for the entirety of the case. So every motion from discovery motions to motions for extensions to summary judgment, all of that would risk problems of duplication and inconsistent judgements if the

cases were to run separately.

I think Your Honor is quite familiar with the issues in this case, especially after the four extra briefs filed this week, and especially with the ones that are unique to this case, which outnumber the five claims in *Koons*, but also rests on, you know, overlapping issues of law.

And so, you know, there's a reason why the local rules don't say cases get assigned to the judge who ruled first or had the case for longer. It's to preserve the neutral, consistent playbook for judge assignments.

Your Honor, I don't know if you received a letter that came in at noon from the *Koons* plaintiffs.

THE COURT: I did.

MS. CAI: I'm happy to address that if you'd like. I know it wasn't part of our schedule.

THE COURT: I did review it, meaning I read it, understood the positions set forth therein.

MS. CAI: I don't know if Mr. Jensen is here today. I know he was here on Monday.

THE COURT: I don't -- based on what I've learned so far and having read the letter, I don't see a need for that letter itself to be addressed.

MS. CAI: Okay. If Your Honor has any questions, we would be happy to answer, or we can submit a letter in response as well. Or if Mr. Schmutter wants to talk about it, I'm

happy to come back up.

THE COURT: Okay. Thank you.

MR. SCHMUTTER: Judge, just for the record, I haven't seen the letter so...

MS. CAI: Great.

THE COURT: So you can't comment on that, is that the --

MR. SCHMUTTER: I can't comment. I haven't seen it. If somebody could tell me what it says, I'd be happy to comment on it, but I literally was driving so...

THE COURT: The gist of it is *Koons* should not be consolidated into this case.

MR. SCHMUTTER: So is it anything different than their original position?

THE COURT: I think originally they were saying -- they were opposing consolidation. So just a -- I'm going to -- I will characterize it as putting a finer -- I'll characterize it as putting a finer point on their position.

MR. SCHMUTTER: Did they comment on consolidating Siegel into *Koons*?

THE COURT: No.

MR. SCHMUTTER: They didn't. Okay. Thank you, Judge. I apologize for not being familiar with that letter.

So unfortunately, the State has stepped into quick sand here, because if they were truly just interested in the

Rule 42 considerations of judicial economy, duplication of effort, preserving resources, fairness to the litigants, they should be indifferent between which consolidation takes place, whether *Koons* is consolidated into this case or this case is consolidated into the *Koons*. They should be neutral on that, but they're not.

They opposed consolidation into *Koons*. And what that reveals is that they are, in fact, judge shopping. In the state of New Jersey, no litigant gets to make that decision.

Now, the Court is aware that we were originally opposing all consolidation, and then after Judge Bumb's decision, our brief on Tuesday took the position that consolidation should take place from Siegel into *Koons*, and it's set forth fully in our papers.

The problem that the State has on the consolidation motion is that all of the Rule 42 factors, all of the Rule 42 concerns favor consolidation into *Koons*, none of them favor bringing *Koons* into here. Your Honor will recall our argument that in addition to the very substantial resources that were devoted to the 60-page ruling in *Koons*, we also argued -- and this was not responded to -- that it's unlikely that that's going to change between the TRO in *Koons* and the preliminary injunction in *Koons* for all the reasons we laid out because they're primarily issues of law, because there is unlikely to be any factual development between the TRO and the PI, that

should matter, for the outcome of that injunctive relief.

And so the problem that the State has is that consolidation from *Koons* into this case works against the Rule 42 factors. It creates more work, less judicial economy, more inconsistency with the efficiency that Rule 42 stands for, whereas consolidation into *Koons* from here favors all of those factors. So the only reason that the State could possibly prefer consolidation into this case and oppose consolidation into *Koons* is because the State of New Jersey wants to pick its judge.

That's the only factor that would matter to the application they're making. And of course, as the Court knows, that's not a legitimate factor. And so if the Court orders *Koons* is consolidated into this case, the only reason could be that the Court is giving the State of New Jersey its choice of judges, and that would be an error of law that would be clearly reversible, it would be improper.

Now, the --

THE COURT: I want to just mention briefly the judge-shopping issue. I've never ruled on any of this anyway. Nobody could really be choosing me because they think I'm favorable because no one knows exactly how -- I haven't issued any other prior gun control, I've never spoken on the issue. And so just to be clear, that is a weaker argument that they actually wanted to be with me, because they have no idea what

I'm going to do.

MR. SCHMUTTER: Understood, Judge. And we agree with that. Although what they do know is that Judge Bumb has already ruled against them on the TRO, right?

So they have some information about Judge Bumb and no information about Your Honor. And so if you're balancing the information they do have with the information they don't have, they clearly would rather be in front of a judge that has not already ruled against them. And so Your Honor's correct, though.

So the problem is that they did the same research we did. We researched whether there's any law, case, rule, statute that actually requires consolidation in one direction or the other, and there isn't. They cited all the same cases. They read the same cases we did. There are no cases that say you have to do it one way or the other.

The only rule, it simply says the motion goes to the judge in the first filed docket, and that judge makes the decision. There's nothing that says how the decision should go and in which direction consolidation should take place.

Now, interestingly, they try to cite Local Rule 40.1(c), the Related Case Rule, but the Related Case Rule doesn't tell -- doesn't govern Rule 42. The Related Case Rule simply says that if you have an earlier case and then a new case is filed, as a matter of allocation, it gets allocated to

the related case. That really doesn't have anything to do with the issues under Rule 42 of efficiency.

As the Court saw in the EEOC case that we cited from the Third Circuit, the Third Circuit is clear that courts are not to apply -- first-filed concepts -- it has to be flexible, it has to serve the interests of justice, it has to serve the equity of the situation. And so the fact that in other consolidation motions it is the general practice to do it the way the State is asking for it, there's nothing compulsory about that.

And importantly, if we think about what first-filed rules -- or first-filed presumptions are about, they're generally about the fact that you typically have a case that's been going for a while, then you have another case, and the question is, should the newer case be deferred to the earlier case?

And we see first-filed rules or practices in a lot of context, comity, transfer under 1404, 1406, the issue in *EEOC vs. University of Pennsylvania* where it was an issue of enjoining a subsequent case, and we see it in the procedural approach to Rule 42 and local Rule 42.1.

But none of the first-filed values, purposes are present here and here's why: These cases are -- for the purposes of Rule 42, these are simultaneous cases. These cases have consecutive docket numbers, they were filed within

minutes, maybe even seconds of each other. The way this went down -- I can't speak for Mr. Jensen, but I know what I did. And I was watching the press conference, and the moment the Governor put pen to paper, I pressed the "file." I'm sure he did the exact same thing, and so we have consecutive docket numbers. Their case was filed within minutes of ours.

So they really are -- from a Rule 42 perspective, they're simultaneous cases. Neither case, when they were filed, had a first-filed advantage. None of the first-filed stuff was present that we normally see in cases like comity cases, again, transfer case, enjoining injunction cases where cases are -- none of that is present here.

The only factors that are present here are Judge Bumb's 60-page Opinion. That's what drives this bus. That is the overwhelming factor here. Everything else is equal. The fact that we happen to have a docket number one lower -- I mean, we're 7463, they're 7464. Literally -- and again, I'm not -- I don't have access to the software, but I'm sure if you saw the filing, if you looked at the ECF notices, they must have been filed within minutes or seconds.

THE COURT: Well, interesting that you raised that. The complaint in *Koons* was actually filed first.

MR. SCHMUTTER: Okay.

THE COURT: In ECF, you open and get your assigned number when you open the shell --

MR. SCHMUTTER: That's right. You know, you're right.

THE COURT: -- and the complaint in *Koons* was actually filed first.

MR. SCHMUTTER: So that's interesting. So all I did was is got my -- I opened my case first. They filed -- Your Honor's right. I actually didn't think about that. I had the first opened case; I don't have the first-filed case. Theirs is the first-filed case actually.

So if we're going -- now, if you look at the words of Local Rule 42.1, the procedure is it goes to the judge with the earlier docket number. But if we're talking about first filed, *Koons* is first. So Your Honor's right. I actually hadn't thought about that.

So none of the technicalities that the State is relying on matters here. The equities of the motion overwhelmingly cry out for consolidation into *Koons*. There are no equities that drive it in this direction. And so that's the problem that they're facing. They're asking the Court to do something that's actually contrary to Rule 42.

If they really were about Rule 42, if it was merely about judicial efficiency, fairness to the parties, resources, they should be perfectly fine with consolidating into *Koons*. In fact, they should prefer it because it actually saves the court resources. They're asking for redundancy, they're asking for this Court to decide freshly the issues in our motion when

most of our TRO application would already be disposed of under Judge Bumb's ruling. So they're asking this Court -- and not that this Court can't do work, but the concepts under Rule 42 cry out against that.

And the other thing they're asking for, this is the same basic problem. They're asking the *Koons* plaintiffs now to come over here to have this Court do an entire fresh analysis on the PI when -- and they didn't oppose this -- as we argued in our brief on Tuesday, probably -- again, there's no way to predict what's going to happen for sure, but based on the law and the record, probably the PI will come out the same way.

So they're asking for redundancy in two different ways. It plainly should go the other way around. And that's the problem that the State of New Jersey faces right now. They're in a situation that they can't really get out of. And none of the equities, none of the standards support their application.

THE COURT: Okay. Thank you.

Ms. Cai, did you want a brief response?

MS. CAI: I did, Your Honor. Thank you.

Your Honor, I think what's indisputable is what's driving the plaintiffs' bus is that they saw a favorable opinion from Judge Bumb and that led them to completely change their tune. They unequivocally opposed consolidation until that very moment.

I want to address a couple little things and then I want to get to the big heart of the issue. The little things. So the neutral rule is the lower docket number controls. So it doesn't matter whose complaint got in the door first, who technically amended their complaint second, any of these other issues. I mean, the reason we have a technical rule -- it is a technical rule, but a consistent rule -- is so that all parties play by the same rules.

THE COURT: So here's my question about this, because obviously I looked into -- I looked into this when the motion was filed about first-file, when the complaint came in, whatever. More importantly, I looked at both dockets.

This docket proceeded differently than *Koons* because in this case the first thing filed was a briefing schedule for approval after the case was opened. In *Koons,* the first thing was an order to show cause. And so it kind of tees up why -- even though I have the first-filed docket number, this case is a little bit behind, right? It's how the parties -- the actions taken after the complaints were filed that literally teed this up so that I would get to this -- or I was able to get to this after Judge Bumb. Right?

We're all looking to do the same things, right, get to the right answer, do the best that we can, move the case forward, follow it. Judge Bumb's oral argument -- and, you know, I'm transparent in terms of how I think and how I get to

certain places.

When I saw that Judge Bumb ordered oral argument for January 5th, I went back, I said, oh, my God, am I late? Did I wait too long? And then that is what compelled me to look at the two dockets. How does this happen? I have the older case. To be clear, the earlier docket number.

So I think all of this just underscores that these cases are filed at the same time and the reason, right, that Judge Bumb was able to hear the parties and issue an Opinion and Order ahead of me is because the way the cases were presented for decision by the Judge differently. It really is.

And so I say this because I don't want either of you to spend another second on judge shopping. We don't suborn that kind of behavior. There's nothing that this Court will ever do that will permit judge shopping. And as I've alluded to a little bit before, I'm the newbie in this role. So to suggest that anyone was shopping for me is a little disingenuous.

MS. CAI: Yes, Your Honor. And I'll just point out, we filed our motion to consolidate before anything had been heard from Judge Bumb. I don't even -- it's -- I believe that we got notice of the *Koons*' complaint at like 5:00 p.m. on that -- we knew the case existed, but we didn't know that we were going to get it, and the same night we filed the motion because we knew we wanted everything to proceed together

because it's efficient and we didn't want the case to proceed on two different tracks and to have all kinds of, you know, potential issues there.

I will note just generally, you know, plaintiffs say we're looking at the same cases. I didn't hear him talk about the cases that we cited. Importantly, you know, I think the -- if you look at the cases we cited, there's more. I didn't want to put everything in the brief. Every case in which there's a motion to consolidate and there's two different judges, no matter what had happened in the docket of the second one, if there was more activity, more decisions, more TROs being issued in the second, the higher numbered docket, no matter what happens, after it gets consolidated it always go to the first docket number.

So we gave you two examples, the *Younes*, *Sodhi* case, which actually Judge Bumb herself decided. A lot happened in the later docket number, *Sodhi* case. There was a TRO granted, there was a PI motion that then had been scheduled for a hearing and then was withdrawn, there were other motions. All that had happened, there's almost no activity in the *Younes* case other than complaint was filed, there was an answer, motion to consolidate. And yet after consolidation, everything went to the first docket number.

That's the rule and that's the way it's always been followed, that's all we're asking here. And we make that

request before knowing anything about the order of things, about how either judge would rule, and that's just always been the consistent position we've had.

As for right now, there is very much a reason to consolidate because the case is going to go on, both cases are going to go on, there are a lot of issues in this case that are not in *Koons*. Your Honor seen --

THE COURT: Let's not talk about those now because that's the next argument.

MS. CAI: Sure. I'm just observing, Your Honor, that -- Your Honor has looked at this case, including additional issues as well, Judge Bumb obviously has looked at the issues in *Koons*, and some of them do overlap, but there is obvious efficiency to be gained by combining these cases. And so we just ask that it be combined and go to the same rules of decision that has always existed, and there's no inconsistency in that.

Finally, I will note, just because I don't know if I'll have a chance to address these issues again and just in case, you know, additional letters or whatever come up on the *Koons* plaintiffs' letter -- Mr. Schmutter, he's free to talk about this later on if he wants to.

I just want to correct a couple things because I think it's -- just for the record and we're making a record here. So the first thing is that we haven't appealed the *Koons* decision.

It's now Thursday. It's black letter law that generally TROs are not appealable. There are circumstances that could happen later. We haven't gotten there yet. And it depends on the kinds of claims. And they were bringing, you know, specific kinds of claims that make that -- there's no mandatory requirement that if a case gets consolidated after a TRO has been issued, that we would somehow need to seek reconsideration of the TRO before appealing. I mean, we're not appealing right now and that's not really an issue, but that premise is really mistaken.

And then finally, the PI schedule in *Koons*, that's not set. And I was a little surprised to see Mr. Jensen -- I hate to say this while he's not here, but he omits the fact that the agreement that we had tentatively was in case there is no consolidation. And he's the one who actually asked me not to put -- he said, is it okay if we wait to file this with Judge Bumb until after the hearing today. And so it does surprise me that he said that that was a firm agreement when it very much was not.

But all of that is to say it doesn't matter because the reasons that we've given this Court are just the reasons that have always been followed and the way it should be consolidated -- I think no one disagrees there should be consolidation and we're just suggesting that the way that it has always gone is the way that this case should go, it should

not be the first case that we would be aware of to be consolidated the opposite away.

Thank you, Your Honor.

THE COURT: You're welcome.

All right. Mr. Schmutter, are you ready to address the TRO and preliminary injunction?

MR. SCHMUTTER: Yes, Judge.

THE COURT: And I'm also going to streamline the arguments in this. According to your papers, Judge Bumb resolved a hundred percent of the TRO. To be fair, nearly, I think, were your words. Right?

Explain that to me. Because you know your adversaries disagree with that wholeheartedly.

MR. SCHMUTTER: Absolutely, Judge.

So Your Honor saw our chart, Exhibit B to my declaration -- and just to clarify, we're not asking for the preliminary injunctive relief today, just the TRO. And so we intentionally on Exhibit B broke it up into pieces. We wanted it to be absolutely clear, what are we seeking on the TRO, what are we seeking on the PI later.

And when you compare Exhibit B, the two, the pieces of Exhibit B, it's clear that on the TRO we're only seeking relief on sensitive-place issues. Now, we are asserting multiple theories on those issues, not just the Second Amendment, but as we said, our TRO application could be fully disposed of just on

the Second Amendment issues. And so whichever Court hears our TRO and decides our TRO, the judge need not reach the First Amendment issues, the equal protection issues, and the due process issues if the Court grants all our relief on Second Amendment grounds.

And so -- now, so that's concept number one in answer to Your Honor's question.

Concept number two is that the State's opposition is exactly the same, for the most part. Not a hundred percent, but mostly the same. Mostly the same arguments on standing with a couple of exceptions; exactly the same arguments on historical tradition; exactly the same arguments on irreparable harm. And so these things have been resolved already.

And so it's all the same citations to the old statutes. Judge Bumb dealt with all of that stuff. We make essentially the same arguments, mostly the same arguments that the plaintiffs did in *Koons* on the historical tradition; the issues of standing are the same.

And, in fact, as Your Honor's aware, Judge Bumb found in favor of the *Koons* plaintiffs on standing. We think our standing facts are even stronger with respect to the allegations made by the plaintiffs. You know, I regularly go here, I do this three times a year, I frequently do that, from time to time I do this. We covered the bases in great detail, more than we really needed to.

And so on standing issues -- again, standing, irreparable harm, likelihood of success on the merits dealing with historical tradition, most of that work has already been done. The only difference is -- oh, and I guess this is one of the things maybe Your Honor was asking about, the analysis on historical tradition applies equal to all the other sensitive places we brought into play. So their historical references don't do any better on all of the other sensitive places than on the first five.

Your Honor will recall that the *Koons* plaintiffs sought relief as to libraries and museums, Section 12; restaurants, Section 15 -- or that serve alcohol; Section 17, which I believe, if I recall correctly, is entertainment facilities; 24, which is private property; and 7(b), which is the vehicle restriction. All the same argument, all the same findings, all of the same deficiencies in the State's proffer of historical references and historical citations all apply to the rest of the sensitive places that we are challenging as well in our TRO.

So as a matter of the record, it's almost completely there. There's very little -- all the heavy lifting really has been done. There's very little else that has to be done to resolve the TRO under Judge Bumb's analysis and Judge Bumb's ruling.

Does that answer Your Honor's question? I hope I went

to where Your Honor was asking.

THE COURT: Yes, you did.

MR. SCHMUTTER: Okay. Thank you, Judge.

Does Your Honor have any other particular way you want us to do this? There's a lot of stuff.

THE COURT: So, yeah. If Judge Bumb has rendered your application resolved -- I'll use your words, "resolved" -- what's before me? What's related? What do you need a decision from me on?

MR. SCHMUTTER: Well, so -- you mean if you keep the case, if Your Honor keeps the case?

THE COURT: Yes.

MR. SCHMUTTER: Okay.

THE COURT: If I were to decide what is before me still right now, the TRO for plaintiffs. Because even though I understand and fully read your submissions, the fact that you indicate that Judge Bumb's Opinion nearly resolves all of your TRO requests is intriguing to me because these plaintiffs are very different.

But if that is your supposition and position, then what am I deciding? What am I enjoining? What are you seeking a TRO on? I'm trying to say this as plainly as I can.

MR. SCHMUTTER: Understood, Your Honor.

So let me clarify something from our perspective, and I want to make sure we're all on the same page on this. We

think consolidation should be decided before the TRO. So we think that if the Court is going to send --

THE COURT: Wait.

Do you agree with that, Ms. Cai, that consolidation should be decided before the TRO?

MS. CAI: I don't have a view on how -- the Court has discretion to decide whichever motion to decide first.

THE COURT: So let's go through the reasons why you say that.

MR. SCHMUTTER: For exactly the question Your Honor raised. If -- because if -- the savings -- the Rule 42 values, savings of judicial resources, is maximized by Judge Bumb deciding our TRO application. That's where half of the value of consolidation comes.

The other half is preventing this Court to have to repeat for the *Koons* plaintiffs what Judge Bumb already did. So there are two pieces to it. There's judicial economy as to our application and judicial economy as to the *Koons*' application for preliminary injunction. So if the consolidation takes place immediately, then Judge Bumb decides the TRO, 98 percent of the work is done. That's what we meant by that.

Now, there is the other aspect of it, which is, number one, collateral estoppel. The Court saw our collateral estoppel argument. But even if the Court doesn't think that

the defendants are collaterally estopped, we think the Court should adopt Judge Bumb's reasoning and, therefore, in that sense, all of that work is already done. All right. If this Court determines -- if this Court's going to hear the TRO and decide the TRO, regardless of if consolidation happens or when, if this Court is the one who decides the TRO, this Court can and should adopt Judge Bumb's 60-page reasoning. Those principles, again, get this Court almost to the finish line.

The only other things this Court would have to decide are the -- there's some additional standing arguments relating to, for example, Bayonne and Union County and the Parks Commissioner and the Fish and Game. So those are some unique arguments, which we don't believe are meritorious, but those aren't present in *Koons*. So whoever decides the TRO would have to reach that. That's not addressed in *Koons*. Okay.

And then the additional elements that we're challenging. So we're challenging parks, beaches, recreation facilities; we're challenging medical and treatment facilities; we're challenging casinos; we're challenging racetracks. So what the Court should do, whether it's Your Honor or Judge Bumb, what the Court should do is take the analysis and principles already established by Judge Bumb, because it's very sound, and simply apply them to the other provisions so they apply equally to all the other provisions, because under the Second Amendment *Bruen* analysis, the State's historical

references do no better on racetracks, medical, casinos, all the other ones, airports, transportation hubs, than it did for the five that the *Koons* plaintiffs raised.

It's the same analysis. You just map it onto these other challenges and it works equally well, and the State's position is equally deficient as to all of those.

That's -- and if the Court wants to -- we don't think it needs to, assuming the Court -- again, either this Court or Judge Bumb, determines -- if the Court determines that we are entitled to complete relief, the Court need not reach the First Amendment due process and equal protection issues. But if the Court is uncertain about that, then the Court -- again, this Court or Judge Bumb should reach then the First Amendment issues, the equal protection issues, and the due process issues. So that's what we see in terms of how -- the way this ought to go.

THE COURT: Understood.

MR. SCHMUTTER: Okay. Thank you, Judge.

I want to -- I'm not going to -- I'm going to try to avoid repeating what's in our papers. This is a lot of papers. Your Honor read them, of course, so I'm not going to waste the Court's time.

I want to do just a couple of things beyond what we've already said. I want to emphasize and sort of give a big picture of the *Bruen* framework because it's really critical --

resolving any of these motions and all of these issues requires putting *Bruen* in the right context, and that's critically important.

So when one reads *Bruen* from cover to cover -- and that's really the way it has to be -- the defendants have cherry-picked pieces of the case and drawn the wrong conclusions about what *Bruen* actually does. When you read *Bruen* cover to cover, start to finish, it is really clear that *Bruen* says there is a fundamental, broad right to carry a handgun outside the home for self-defense.

And what that means is, that when a person walks out their front door, they should be able to carry -- defend themselves as much as when they're in their house, and should do so other than under exceptional circumstances. And that means there is a broad default rule of carry. People should be able to carry handguns in most circumstances at most times in most situations.

What this law does is the exact opposite of that. And you don't have to have watched -- although it helps to have watched the June 24 press conference, the day after *Bruen* was decided. *Bruen* is decided June 23rd; June 24th, the Governor and the defendants, Platkin and Callahan, had a press conference in which they talked about how much they hate the ruling and how they're going to do everything they can to undermine it. They didn't say "undermine," but it was really

obvious from the subtext. The Governor signed an executive order basically telling all of the departments to do everything -- come up with every idea they could possibly come up with, and he announced his wish list of sensitive-place restrictions, which he got six months later.

(Court reporter interruption)

MR. SCHMUTTER: I'm sorry. I apologize.

And he announced his wish list of sensitive places, which he got six months later.

Then you look at the debates in the committees, in the Assembly and the Senate, and you see all these comments about how much they hate people carrying guns, how people shouldn't carry guns, how it's dangerous to carry guns. But *Bruen* clearly says that is not a proper consideration; people have that fundamental right to do that.

And that comes straight out of *Heller,* that you don't get -- the State of New Jersey doesn't get to decide that people shouldn't be carrying guns. It's a fundamental right. That was decided when the Second Amendment was adopted, and yet the politicians, including these defendants, keep talking about how much they hate this.

And when you look at the -- when you look at the YouTube video of the signing ceremony on December 22nd, it's the same stuff, just more speakers. The Governor, the Attorney General, Giffords -- you know, all the groups, the Senate

President, the Assembly, the Speaker, all talking about how people shouldn't carry guns. But that's not constitutionally permissible, and yet that's what they're doing.

And if there's any question about whether the purpose of this law is to stop people from carrying guns, all you need to know is that *Bruen* says that when you walk out your door, you should be able to carry a handgun for self-defense; and the very first thing every single person has to do is unload and lock up their gun and put it in the trunk of their car. The moment you walk out your door, you have to be disarmed.

So it's impossible to come away from this law and not see what they're trying to do here. There's a fundamental disregard for the *Bruen* case. And so it's very important to look at it that way, because once you look at it that way, you can see what they're doing.

Now, also in the context of the *Bruen* analysis, I want to talk about analogies. The inner papers, the State talks a lot about analogies, and what they try to -- and I understand why they've tried to do this -- and we've talked about this in our papers, I won't get too far into it, but --

THE COURT: Slow.

MR. SCHMUTTER: I am sorry, Judge. I have that problem all the time. I've been doing this for 30 years, I still have that problem. I apologize.

As the Court saw in our papers, they've attempted to

aggregate dissimilar concepts in order to boost the numerosity of their examples because they recognize that *Bruen* was absolutely clear, that a small number of examples doesn't create a tradition. Remember, *Bruen* is about historical tradition. And *Bruen* explains that tradition involves widespread practices and long-lasting practices.

And so the Court is clear, one example, two examples, three examples doesn't do it. And that was three examples out of 13. Most, almost all of them, maybe one or two exceptions, of the State's examples are from 1860's, 1870's, 1880's -- and we've already briefed that issue, so I'm not going to belabor it, but by that time, there's 30, 40 states.

So if they have one example or two examples, it's even worse from a *Bruen* perspective to establish tradition. They don't get to use these outliers. And that's what outliers are in the context of *Bruen*, and that's what Judge Bumb meant when the Judge mentions "outliers." Outliers has numerical significance, not simply -- because something could be an outliner for a variety of reasons, right? It could be an outlier because of territory, it could be an outlier because it lasted only for a year, like in Texas, for example. But most important, outlier means there's only one or two or three, you know. And the Court was absolutely clear about, there's no question you can't do that. That's not a historical tradition.

But the attempt by the State to aggregate these

dissimilar things, what they're trying to do is they're trying to create artificial concepts that allow them to analogize, but they don't get to analogize here. The Court was clear, you only get to analogize when there's unprecedented societal concerns in the modern era.

But we know that's not at play here because *Bruen* told us, and so did *Heller* and so did *McDonald*. *Heller*, *McDonald*, and *Bruen* are explicitly about how the State deals with handgun violence. And in all three cases, the Court said you cannot regulate possession of handguns to address that.

In *Heller*, it was possession in the home because that's what Dick Heller, the plaintiff, wanted; *McDonald*, the same thing, that's what Otis McDonald wanted; and here, that's what the plaintiffs in *Bruen* wanted. So the Court has already disposed of that. There is no unprecedented societal concern. It's the same issue as in those three cases. That's thing number one.

Thing number two, dramatic technological change. Again, this is handguns. *Heller*, *McDonald*, and *Bruen* all dealt with modern handguns. There were no dramatic technological changes at work in those cases. This is the same. So they don't get to rely on dramatic technological changes to analogize.

The third context is modern regulations unimaginable at the time of the founding. These are just prohibitions on

handgun possessions. There's nothing unusual about these. Again, it's no different than *Heller* and *McDonald* and *Bruen*. It's preventing law-abiding people from possessing handguns for self-defense. That's what the regulations are. So again, they don't get to rely on that prong.

And at page 2133 of *Bruen*, when they talk about what analogies are for, what that process is for in the context of sensitive places, the Court says, new places. New places. And they emphasize in italics the word "new," because all of the places on the sensitive-place list existed in 1791. They had parks, they had beaches, they had libraries, they had museums, they had gambling houses, you know, they had restaurants. They had all of these things. They had public gatherings. All of that stuff existed.

And so -- they had vehicles. They were different. But as we know from *Heller* and *McDonald* and *Bruen*, you don't -- and from *Caetano*, by the way. *Caetano* is actually very instructive on this. You don't treat the right differently just because a modern version of something is different. So, you know, modern firearms are no different than 18th Century firearms.

Same thing under the Fourth Amendment. You know, modern methods of surveillance. Same thing under the First Amendment, modern methods of --

(Court reporter interruption)

MR. SCHMUTTER: Modern methods of speech. The internet, radio, television versus pamphleting.

The Court is clear, you treat them the same, and you don't get special rules simply because modern technology looks different than what things looked like in the 18th Century. And so new places, something wholly different than what was happening in 1791, there are none. And so they don't get to analogize.

So they complain in their -- in their supplemental briefs from Tuesday, the initial supplemental brief, because Your Honor had asked us to initially brief the impact of the *Koons* decision, they complain that Judge Bumb was improperly forcing them or compelling them or expecting them to be exact or to be a carbon copy -- they used the language from *Bruen*. But that's -- now, I don't know if that's a proper description of what Judge Bumb did. I think it's a little overstatement. But the point is, she was correct to demand a very close fit between the modern regulations that they're trying to support and the historical examples because this is not an analogizing opportunity.

And the State says something very revealing in their brief which is, again, incorrect. And this is their -- in either the supplemental brief or -- yeah, this is in their supplemental brief on Tuesday. They say that *Bruen* invited states to analogize, and that is not an accurate description of

what *Bruen* did.

I heard that -- I don't know if this is where they got it, but I heard that in one of the hearings in the Senate, I think it was the Senate Judiciary Committee, where one of the Senators said, well -- and the discussion was, is there historical tradition that supports this bill as it was making its way through the legislature. And one of the Senators said, well, we don't know, but *Bruen* sort of invites us to give it a shot and we'll pass it and see what happens.

That is so exactly the opposite of what *Bruen* actually says. There's no invitation to states, like to Jersey, to just throw it out there and try it and see what happens. It's the opposite. *Bruen* says, as I said previously, there is a broad and general right to carry handguns and only in exceptional circumstances can that be denied. So it's not an invitation to just see what flies and see what sticks to the wall, it's it should be a very careful analysis of what are those very narrow exceptions, what are those very limited exceptions that are very closely related to the ones that we know like polling places, legislative assemblies, and courthouses, you know.

And so when the State tries to invent these kind of arbitrary categories like government and constitutionally-protected activities, that's not even stuff that goes together. Again, they're trying to aggregate so they can bump up the numbers to meet the numerosity requirement.

Where crowds gather is another one of their categories. I mean, not only is that not a meaningful aggregation of -- that's an aggregation of dissimilar items, but it's specifically prohibited by *Bruen*.

Bruen goes out -- they have a whole discussion of like how crowds don't count. New York tried to take that position in *Bruen*, and the Court said, no, if you allowed crowds, then it's everywhere. Everywhere is crowded. New York City is crowded, New Jersey is crowded. New Jersey is one of the most crowded states in the country. Crowds don't count.

And so for the State to say, oh, yeah, we're going to have a category of crowds, I mean, it's directly contrary to what *Bruen* says explicitly, you know. So it's important to recognize that what they're doing in terms of building these artificial categories is they're trying to get an end run. They're trying to do an end run around what *Bruen* says is required, and it really shouldn't be allowed.

And I guess the last -- I guess the last thing I want to get to, Your Honor, is just I -- standing. We've briefed standing, you know, exhaustively, but I want to remind the Court about -- I don't want this to get lost, because this was in our reply brief from last week and there have been two briefs from each party since then.

In addition to all the standing arguments that have been very thoroughly briefed, including yesterday, I want the

Court to remember that -- and this goes to redressability and traceability, you know, that prong.

Remember, we argue in our reply brief that the Attorney General, by Constitution and statute, the Criminal Statute Act, is the chief law enforcement officer of the state. That means that all law enforcement is subordinate to the Attorney General, who is the lead defendant in this case. That means that the Union County Police, the Union County Prosecutor, the Bayonne Police, the Bayonne Municipal Prosecutor, they are all bound and subordinate to the Attorney General, so redressability is actually not a problem because, as we said in our brief, this Court could fashion a remedy that would instruct the Attorney General to ensure that any authority that's subject to his jurisdiction does nothing that's inconsistent with this Court's ruling.

So if the Court gives us relief on parks, for example -- because this really is the park issue. If the Court gives us relief on parks, not only will it enjoin, you know, the park provision, but it could fashion a remedy that says the Attorney General has to ensure that Union County and Bayonne and any other jurisdiction that has similar restrictions do nothing inconsistent with the Court's ruling. The Attorney General can do that as the chief law enforcement officer.

Relatedly, the Attorney General has concurrent jurisdiction vis-a-vis parks and vis-a-vis fish and game. And

so while the Parks Commissioner and the Fish and Game Commissioner can visit civil penalties under those regulations, the Attorney General has concurrent authority with respect to criminal penalties.

So redressability is vast. The Attorney General is directly implicated into those regulations as well. So it's not like you have some arbitrary separate coequal official that the Attorney General is unrelated to. The Attorney General is deeply embedded in both of those regulatory structures, has criminal authority, and therefore, in terms of redressability and injunction against the Attorney General, would absolutely satisfy what *Lujan* requires in terms of redressability.

Remember, the Third Circuit's clear, that you don't need -- concurrent causation is fine. You don't need complete relief, you just need relief. And if this Court gives injunctive relief as to parks on that issue, these plaintiffs are vastly better off precisely because of that.

And then I guess the final argument is simply the declaratory judgment argument. Again, we don't want that to get lost. We're also seeking declaratory relief. And, you know, as the Court knows, municipalities and counties and other departments of the State of New Jersey are all creations of the State of New Jersey.

If the State of New Jersey is subject to a declaratory judgment that parks and recreational facilities -- that

restrictions in parks and recreational facilities are unconstitutional, as a matter of declaratory judgment, Bayonne doesn't get a second bite at that. If the State of New Jersey loses on that issue, the State of New Jersey loses on that issue, the whole state loses. Bayonne doesn't get another shot at that; Union County doesn't get another shot at that; and the Parks Commissioner doesn't get another shot at that. So the declaratory judgment makes a big difference in terms of redressability.

And then the final point on the declaratory judgment is under 1983, it would constitute clearly established law. So whether or not under -- you know, under the qualified immunity rules. And so if some public official in Bayonne or Union County, or even the Parks Commissioner tries to visit some criminal or civil penalty against these plaintiffs in the face of a declaratory judgment that says it's unconstitutional to do that under *Bruen*, you can be sure they would be subject to damages under 1983 and they would not have the available defense of qualified immunity.

Again, that's complete redressability because declaratory judgment takes care of all of it. Everybody would be frozen in place. If nothing else, because of under the penalty of 1983 damages.

If Your Honor has any questions, I'm happy to address them. Otherwise, I don't want to take up any more of the

Court's time.

THE COURT: Thank you. No questions at this time.

MR. SCHMUTTER: Thank you, Judge.

MS. CAI: Your Honor, I think I'll go in the order that Mr. Schmutter did, which is first talk about what's before this Court. I'll make a couple broad points on the merits. I do want to get into the provisions, because it seems like we were talking about in broad generalities before, and then I'll end on sort of the standing, irreparable harm, and public interest issues.

So what's before this Court? To be clear, you can look at Mr. Schmutter's Exhibit B to his declaration where he helpfully lists out what the TRO claims are and what the PI claims are. There's 18 locations, by my count, maybe 17, something like that --

THE COURT: 19.

MS. CAI: -- that are challenged in Siegel. Some of them have multiple constitutional claims. I could tell you 13 of those are not in *Koons*, period, full stop.

So those are claims that are -- have only been before this Court, have only been briefed before this Court. They are only case -- they're only issues that this Court has reviewed. And in addition, they are individual plaintiffs in this case that are, obviously, not in *Koons*. They have -- they're distinct declarations, claims in those declarations.

And we laid all of this out in our Tuesday letter, and I don't really hear a response from plaintiffs except to just try to say a hundred percent of the issues are resolved in *Koons*. I mean, that's just not true.

Let me put it this way: If this case were sent to Judge Bumb, or any new judge, they would have to hold a new hearing, potentially receive some little briefing, but we're here now before this Court. This Court has received all of our materials, rounds and rounds of briefing, and obviously, is hearing argument.

So I think it's --

THE COURT: But what happens with the *Koons* case?

MS. CAI: Well, Your Honor, if Your Honor wants to hold off on deciding those claims because there's already a TRO, it can do that. You can look at those claims and decide if you want to deal with them later on. All we're saying is that it's very inefficient to resolve only the claims that are before this Court, which are numerous, and have only been before this Court for the past few weeks that we're here to discuss and to argue today.

And I think that's why this Court --

THE COURT: Well, let me ask the question a little differently. And I understand your response and it did respond to my question. I didn't mean to suggest that it didn't.

MS. CAI: That's quite all right, Your Honor.

THE COURT: In effect, Judge Bumb has granted a TRO --

MS. CAI: Yes.

THE COURT: -- on these sections. I want you to talk to how those -- how that grant, those restraints on those five -- let me get it right -- special places translate here. Because they do, don't they?

MS. CAI: I think, Your Honor, there are -- it depends on how you look at it. So what I would like to do is to go over the provisions and tell you what evidence we have to support each provision that's challenged here and why there may not be any reason to look at the *Koons* decision for at least many of those provisions that are challenged here.

THE COURT: So let me -- the reason I want to pause and have you think about this is, as I read your supplemental briefing, you are truly -- when I say "you," you understand I mean the State, not you personally. We keep that in mind. This is not about us. We're all doing our jobs and that's it, including the Court.

You're asking me to -- and perhaps the legal terminology is not the best I'm going to use, but reconsider Judge Bumb's Opinion and apply it differently. That's what you're asking me to do at the end of the day. That's how I read it. Tell me why I'm wrong about that.

MS. CAI: Your Honor, you are free to do that, but I'm telling you that you don't have to do that. And so there's a

distinction between the arguments we made -- and I think Section 2(a) of our brief, which is regardless -- you can take every word in the *Koons* TRO decision as-is and you could issue a decision certainly as to the 13 other places and the other constitutional challenges that don't conflict with the judgment from -- the TRO judgment. And that is an option this Court has.

Now, we do disagree with some of Judge Bumb's reasoning, and we've highlighted that to the Court in Section B. And this Court is also free to accept that or parts of that and review that. And so that's all we're saying, Your Honor. There are many issues that are only in this case and not in *Koons*.

THE COURT: And so I'm pausing you again. This is why -- and I'm not sure it was in the briefing, but this is what I have been struggling with for the past day and a half, two days, if I decide the motion to consolidate first. If I decide the motion to consolidate first, and I find that the equities militate in favor of Judge Bumb, do I even need to reach the TRO here?

Which is why I pressed Mr. Schmutter on this -- you know, because if I took it at face value, it's a hundred percent done. Okay, well, I'm done then on the TRO. Right? But we all know, counsel, the Court, that Judge Bumb's decision didn't quite do that because these plaintiffs, number one, are

deferent people with different issues and different factual underpinnings to their challenge to this law. Moreover, they challenge more. They challenge more, more places, more principles. Right? We have the other principles that are out here that are challenged, the First Amendment, the code, the -- there are differences.

If you can think about that and give me how you process if I decide the consolidation first and I put Siegel into *Koons*.

MS. CAI: Your Honor, I think the two questions are somewhat related in the way that you've asked it --

THE COURT: Uh-huh.

MS. CAI: -- which is, because the claims that are distinct in this case are before Your Honor and have been fully and are being fully fleshed out before Your Honor, it wouldn't support consolidation of Siegel into *Koons*, in addition to the rules-based arguments that we already made before, because these are, as Your Honor just said, new claims, distinct claims, unique claims, and they have only been heard by this Court. And to repeat all of that, to send it away for a new decision, I mean, that's not efficient.

THE COURT: But that's not totally accurate because the only thing that is different at this juncture is the TRO claims. Right?

So this is why we needed time with Bumb's decision.

If, in fact, she's enjoined the State from doing these things -- which she has. That's how we read it. Probably didn't say it, you know, totally correctly in the legal verbiage. Is there irreparable harm left for me to address on a TRO? Isn't the only thing left a preliminary injunction? Isn't the only thing left a preliminary injunction?

And if a preliminary injunction is the only thing left, don't the efficiencies and the principles that support consolidation, putting aside first filed, doesn't that really guide this Court to consolidate the case into Judge Bumb's case and so it provides all of the efficiencies that consolidation speaks to?

MS. CAI: So, Your Honor, I think there's two different questions there. First is the 13 out of the 18 locations that are only in this case. So Docket No. 810, Mr. Schmutter has listed all the claims that he's seeking a TRO on. Now, there's probably another, you know, half a dozen or more claims that are not before this Court on PI, but for the ones that he's seeking a TRO on, these are not in *Koons*. So protests and public assemblies, casinos, parks, youth sporting events, airports, hospitals, filming locations, fish and game restrictions, whether or not the same parcel of property is shared with a school, these are not things that are in *Koons* at all. And I can go through why --

THE COURT: But isn't the effect of *Koons*, doesn't

that deal with this?

MS. CAI: No, Your Honor. I think there are reasons why these claims -- they are distinct claims, there's distinct evidence to support these claims or support the provisions that they're challenging, and those arguments are only before this Court, and this Court would be considering those.

Now, as to the five that the *Koons* -- five provisions that the *Koons* Court has ruled on on TRO, Your Honor brought up a point about irreparable harm on that and this posture, and I guess -- you know, I hadn't thought about it quite in that way before, but I suppose you could say that because there is a TRO currently on those claims, plaintiffs here don't have irreparable harm on those five.

Now, I don't know if Mr. Schmutter agrees or not and he can respond --

THE COURT: No. My argument is on any of it. Like, I don't need to deal with the TRO at all because it's been dealt with.

See, this is why -- again, you know, lawyers and judges have to be very careful with the words they use, especially when they put it in writing. You said nearly a hundred percent, and then today Mr. Schmutter said 98 percent of the work is done. What's the two percent? That's what I'm trying to discern. Because you can't possibly be arguing to me that the two percent are these other 13 claims.

MS. CAI: Your Honor, we have never argued --

THE COURT: No. I'm really talking to Mr. Schmutter. I need to make --

MS. CAI: You were pointing at me and I was getting nervous. Yes.

THE COURT: I need to make that clear. I was really directing those comments to plaintiffs' counsel. And, look, I practiced a long time. I know how to chase rabbits and know how to get them out of the way. This is not a rabbit. This is a real thing. This is plaintiffs' conceding, as I view it.

MS. CAI: Your Honor, if you think that plaintiffs have conceded that they do not require injunctive relief from this Court, then this Court can just deny the TRO and all the issues can be decided on preliminary injunction when the TRO expires. I mean, that's --

THE COURT: But not fully, not completely because I have to take into consideration the effect, right? Because the reason why I would even be able to is because of the analysis that Judge Bumb has already undertaken.

This Court's in no position, inclination, or of the mind that I've got to revisit the *Koons* decision, notwithstanding your significant briefing that suggests perhaps I should. That's not where I'm at. And so I'm raising this and speaking to you and counsel about this because I want you to focus on what I believe the challenges to a decision for me

are.

MS. CAI: Right. So I think that means, if I'm hearing Your Honor correctly, that you want to talk about only the claims that are in this case and not in *Koons*, and so we can do that.

THE COURT: Yes.

MS. CAI: So if we want to start from, you know, the first numerical one, which is Section 7(a)(6) on public demonstrations.

THE COURT: And further limit the ones that -- I'm sorry. Perhaps I've done this a little backwards. I probably should have Mr. Schmutter tell me what's the two percent of the case he thinks is left, and then have you respond to that.

MS. CAI: I'm happy to have him talk about that.

THE COURT: Because that way you're more circumspect in how you address it and it actually speaks to what I'm thinking about how this case should be resolved. The matters before me today right now, not entirely.

MS. CAI: Sure.

MR. SCHMUTTER: Judge, I want to make sure I understand what Your Honor's asking and saying about the 98 percent issue because I'm not sure I followed it.

Our contention -- when we say "almost all the work has been done," what we mean is that as to those 13 -- I'll take counsel's word for it. I didn't count them. But that sounds

about --

THE COURT: From my count is there's 19 all together, she decided five, so there's 14.

MR. SCHMUTTER: Fair enough. I get it. Whatever it is. Your Honor has a chart, and I have a chart so --

THE COURT: We all have charts.

MR. SCHMUTTER: Yeah, charts are helpful.

The two percent includes actually entering an order because we -- even though Judge Bumb did all of the analysis or almost all of the analysis necessary to get relief on those other 14, we don't have relief on those other 14. Right? So the next step is enter an order.

That's why -- that's our application for a TRO. So we need those five and the other 14. But our point is, all the same analysis applies. There's no additional *Bruen* kind of analysis that has to be done because everything Judge Bumb said in enjoining the first five applies equally to the other 14. That's our -- that's what we mean by 98 percent done.

And then the other two percent, in addition to actually signing a TRO for the other 14, includes those other kind of issues that are outstanding like the Parks Commissioner's -- they're standing issues on the Parks Commissioner and Bayonne and Union County. That should be resolved on that issue because that's not on *Koons*, so Judge Bumb didn't deal with that. But that's why we say almost all

of the work has been done because the *Bruen* part, the fundamental *Bruen* part, that all applies to this case. That all applies to the 14.

And so if the Court is inclined to think that Judge Bumb's analysis need not be redone, that gets you, Your Honor, at 98 percent of the way to giving us relief on the other 14 because it's all the same, it all applies the same way. That's why we pointed out that the State's historical examples are all the same in both cases. It doesn't do them any better on the other 14 than it did on the first five.

So the step would be to simply take the analysis from Judge Bumb, apply it to the 14 in the same way, and we get a 19-item TRO instead of a five-item TRO that the *Koons* plaintiffs have.

THE COURT: Thank you. Now I want to hear -- now that that's clear on the record, let me hear from Ms. Cai.

MS. CAI: Your Honor, I think Mr. Schmutter's not -- I think when he says 98 percent or two percent, he means he agrees with everything that Judge Bumb did in *Koons* and so someone can go and apply that to this case. That's all he's saying. But that's not actually what's happening here. There are 13, 14 new claims, and we have actually additional evidence on those claims that Judge Bumb doesn't even have before her because they were not before her.

There are -- plaintiffs have plaintiff affidavits

about their desire to visit those places that are not in *Koons* because those were never challenged and the *Koons* plaintiffs never talked about it. So by definition, this is just a fallacy to say all one needs to do is to take the *Koons* Opinion and then enter an order against all of these other provisions that were not challenged there. I think that doesn't make any sense, it would -- as I said, if this -- if those new claims were to be heard by a different judge, we would need to submit all of that before that judge again. And so it's not -- and to go through all the evidence and all that.

So I can give you some examples of where this -- you know, this becomes very, very crystal clear. And actually the very first example is the first provision that the *Koons* plaintiff challenged but -- sorry, the Siegel plaintiffs challenge and the *Koons* plaintiffs don't, which is Section (a)(6) on public assemblies. I'll talk about standing and irreparable harm separately because I think, you know, we just want to focus on the issues here.

We've cited numerous examples of historical restrictions on public assemblies specifically. So that's Exhibit 5, 8, 10 and 22. Some of those are not even before the *Koons* Court because, again, this provision was not challenged there. And these are specific historical analogs that specifically mention public gatherings and public assemblies. They are, for lack of a better word, historical twins, which

are not required under *Bruen*, but certainly if you have them, they can only support the finding that these location-based restrictions for firearms are supported by long tradition of constitutionality.

And I think what's very clear is that these are claims and evidence that are only before this Court. And we can talk about, you know, plaintiffs' arguments that went to these particular exhibits that are also not before the *Koons* Court. So, for example, they have an argument in their reply brief about the Georgia law, Exhibit 22, not before the *Koons* Court, about how it only mentions public gatherings and that must mean other things like voting and mustering and not general public gatherings.

We are responding by saying actually it says public gatherings except for militia muster grounds, and then it talks about elections separately. So public gatherings means what the statute says on its face. We're making all these arguments uniquely on this particular piece of evidence that's in this particular claim before this Court.

And so I think this is a very good example of an argument and a claim that is unique, and you look at the evidence that we submitted before this Court and can make a determination as to the constitutionality of this very long-standing provision that has never been challenged, as far as we know, and plaintiffs certainly haven't put forth any

evidence that the historical tradition was somehow thought to be unconstitutional or constitutionally suspect.

Then we can look at the next provision they challenge, which is Sections 9 and 10, which apply to parks, beaches, playgrounds, other recreational facilities. I think -- I am sorry, I think nine is zoos, although I just got to remind myself which one is which. Yes. Okay. So these are also not challenged in *Koons*. And again, we're only talking about the merits problems, although these definitely also have standing and irreparable harm problems as well.

And this one is also straightforward. Our analogs for these are numerous, directly on point, and not in before the *Koons* Court because this provision was not challenged. So, for example, in Exhibits 23 and 24, we discuss how two of the most prominent public parks in America, Central Park and Fairmount Park, restricted firearms very soon, as soon as they became open to the public or within years thereafter, and in Exhibits 25 through 28 we show how many other large parks open to the public followed suit with the identical restrictions on firearms soon thereafter.

As far as we know -- and plaintiffs have offered nothing to the contrary -- these rules restricting firearms access at parks were not challenged at the time, were not deemed to be unconstitutional. They have nothing to refute this evidence. All of these arguments are only before this

Court.

And I think it's important to also think about the plaintiffs offered evidence on this issues. So, for example, we talk about the rationales behind historical traditions, and parks and beaches are good examples. They're often used for large activities like festivals, concerts and such.

Plaintiff Stamos -- again, his allegations are only in this case -- talk about how -- they only talk about going to these parks in Bayonne for fairs and festivals and special events. That's a good example of why the evidence in this case shows that what *Bruen* calls the how and why of the historical restrictions apply equally to the how and why of the modern restriction that we're comparing.

And so I think this makes a lot of sense in terms of what -- when you're thinking about how to apply *Bruen* directly, I don't think anything that was discussed in the *Koons* decision bears on this provision, certainly in terms of what it was holding and certainly in terms of its reasoning because we have directly analogous evidence and it is directly on point, especially as to how the plaintiffs themselves claimed they want to use these particular locations.

I can skip over the libraries and museums, although I will say I think there's just some confusion there about are they public or not. It only applies to public libraries, that provision.

And then we can also talk about a number of provisions -- and I don't have to go through each and every one of them, Your Honor, they are in our briefing, but I think we can talk about the ones that are not challenged in *Koons* that are distinct here. So that's (a)(11), youth sporting events; (a)(18), casinos; (a)(20), airports and transportation hubs; (a)(23), movie sets. Right? And I think what's unique about these, and it's something that Mr. Schmutter was talking about, is, are they things that existed at the founding such that we can't even try to give analogs? I mean, they are, right? Airports historically did not exist; casinos historically did not exist; movie sets; even train stations, there were no locomotives at the founding.

And so we're looking at comparable locations or comparable restrictions at locations and what kind of rationale went into these provisions. These are things that the *Koons* Court never passed -- you know, passed any judgment on, received any briefing on, and I think we have a lot of very good evidence for these.

So, you know, we talk about, for example, in Exhibit 9, a Texas law that specifically provided that circuses, shows, and public exhibitions are places where firearms would not be allowed. I think that applies to movie sets and, you know, these are -- there are other provisions as well that this Court can look at.

And I think plaintiffs' main argument is that *Bruen* rejected the idea that a place is crowded -- places that are crowded are, by definition, sensitive places. I mean, we agree with that. No one is saying, as the *Bruen* plaintiffs tried to argue to the Supreme Court, that all of New Jersey or Manhattan or even Jersey City is a sensitive place just because the population density is high. But I think it's important to not overlook the fact that *Bruen* said you look to the historical analogs, right? You have to look to that. And just because an expansive, an overly expansive reading of the word "crowded" doesn't work doesn't mean that we ignore the actual historical analogs, the actual prohibited firearms at specific locations.

We're talking about places like the Borgata, Newark Penn Station, Newark Airport. Right? And so these are the kinds of things that we are looking at in terms of the historical tradition that supports that.

And so then we can also -- does Your Honor want to keep going or do you have any questions about some of these -- I don't want to keep talking unless --

THE COURT: No. It just -- honestly, I just -- this is what I hear, revisit Bumb's decision. That's what I hear. And I certainly am not bereft of understanding. I get it. There's additional historical information and data. I'm just compelled that one judge should be deciding these things. That's really the impetus of my understanding of what is

happening here in this case, this case and *Koons*, that these issues should be presented to one judge. That's what I think.

And in so doing, I think it serves the interest of everyone, of everyone. No question, Judge Bumb's decision in *Koons* did not address these things. Plaintiff can't even truly argue this, in all candor. What he's arguing or seeking is the extension of her decision onto these issues. That's what you're arguing for. We all understand that.

Similarly, Judge Bumb's Opinion in *Bruen* is thorough and exhaustive. And so as I'm framing this and my approach to this, I keep landing on, you know, this really should be one judge deciding all this. That's where I keep landing. And so I know both of you have landed there too.

I'm just, honestly, a little -- hindsight is 20/20. Should have dealt with the motion to consolidate, right? And I say this because, look, we're human. And, you know, an emergent motion to consolidate, when does that ever happen? Because even though I'm new to this position, I've been in this courthouse for quite a long time, and so I've seen plenty a motion to consolidate. Emergent? And so I'm just struggling here with how do I address what's before me right now, in light of what Judge Bumb has already addressed, and provide what I'm going to characterize as a roadmap for the parties to resolution? Right? Because as judges, we can only deal with what's before us.

These issues are important, widespread, and the Supreme Court has spoken. So on some level, sometimes, you know, I will say, wow, we wish this was clearer. Not the case here, though, is it?

So, I mean, I don't want to short-circuit or shortcut your arguments, but I do want everyone, counsel to be aware that I've thoroughly considered these and it doesn't land me to what I think is the right outcome. Right? Because I think ultimately the right outcome is one judge. One judge should be dealing with all of this.

Now, which judge? Which judge? We all work really hard, so that's not what you're looking for. You're not looking for a judge shop because you don't know what I'm going to do. The neutrality provisions of 42 and 40.1 specifically are there and well briefed and included. I think this case here, the way that it's teed up, is different.

So I don't want to interrupt your presentation and argument, I don't want to interrupt your argument, but as I get deeper and deeper into your argument, my concerns are not quelled. They're just heightened.

MS. CAI: If I may, Your Honor, on the last set of discussion points?

I think what I would like to do is just to offer what we think is the right roadmap for the sequencing of things, if that may help. Obviously, it's up for Your Honor to decide.

But I think the natural order of things that I think alleviates Your Honor's concerns is grant the motion to consolidate. It seems like the plaintiffs agree it should be granted. We would submit that this Court should follow the rules as they're written and as they have been followed in cases where there have been more activity in the higher docket numbered case, the second filed case, and yet it still goes to the first filed -- first docket number. And that's because you want to follow the same rules and not make, you know, sort of subjective determinations about who did more work and all of that.

Second, this Court can then just rule on the 14 claims that are not in *Koons* on the TRO posture. Everything's then consolidated. We will come back to the PI on all of the claims, as Judge Bumb would have to revisit the five claims on PI anyway if these weren't consolidated. And so it's no different than how it would proceed -- I mean, I think the important thing is that it's going to be a case that has a trajectory beyond the TRO period. Right?

There's going to be PI for sure, there's going to be potentially an appeal from the PI that would give the Court more clarity. After that, there may be discovery, dispositive briefing, all that stuff. All that, we agree, should happen before the same judge, and there's no reason to depart from the neutral consistent rules that it's the judge who has the lower docket number.

But I don't think this Court necessarily needs to be concerned about two Courts ruling on the same provisions that are challenged, because as to the five, I think there's a very natural -- although I wish I could crystallize quite the same way the Court did to say why is there a need for a TRO on five claims that are already enjoined by another TRO?

And so it's really just about, you know, where we are at the PI stage, and the same Court can address all of the claims together at that stage, in addition to all of the claims that -- you know, that are not even at the TRO stage, that are only in this case. And so that's sort of the State's proposal for the path forward generally.

And with respect to -- it's okay to not go through all my prepared materials and the provisions. You have my briefing, they're very voluminous, and I can certainly answer any questions if Your Honor has any on those provisions. And we can even do that on follow-up briefing. I'm sure Your Honor doesn't want that. But if Your Honor were to have questions on that, we're happy to do that.

And so that's sort of my submission on how to resolve the where-we-are-now question and how-to-go-forward question, and I don't think that's at all inconsistent with -- you know, this case is unique, but I don't think it's inconsistent with situations that this Court -- and by that, I mean the District of New Jersey has faced before in cases like the *Younes* case

and the *Ricci* case where, you know, there are -- cases end up in different places procedurally, even though they're supposed to have been consolidated earlier, perhaps, and that's okay. Obviously, we don't want to cry over spilled milk and all that. That's all okay. That has happened before.

That has not prevented, you know, other judges and, you know, the rules of this Court from operating the way -- in a consistent way. Which is, regardless of what has happened in a higher docket numbered case, so long as the need for consolidation has been met, which I think everyone agrees they have, the case, the second filed case falls under the first filed case, and future proceedings, where the benefits of consolidation are very palpable, continue on.

So that's sort of our submission for how this should happen. I'm happy to answer any more of the Court's questions. And I will say, we were gratified to hear from the Supreme Court yesterday on the ultimate disposition of, you know, how -- how injunctions should happen while the courts are dealing with the issue. But, you know, Your Honor already has our arguments on that and I won't belabor that anymore. Thank you.

THE COURT: And to your point, I know you have more prepared materials, but -- and I like to say when it happens, the briefing in this case was superb on both sides. That makes my job harder, though.

MR. SCHMUTTER: We're trying to make it easier, Judge. Sorry.

THE COURT: That's not what happened, though.

MR. SCHMUTTER: May I very quickly be heard?

THE COURT: Yes, you may.

MR. SCHMUTTER: Thank you, Judge.

THE COURT: But that's the only reason that I'm not hearing from you further. You've really briefed it extremely well. And so -- and supplemented it well. Right? The final briefing in this was, you know, 8:00 last night and not 7:59 or 8:01.

Mr. Schmutter?

MR. SCHMUTTER: Judge, thank you. It's interesting that counsel mentioned *Antonyuk* because we all read the same comments from Justice Alito. He is not happy at all so -- but recognizes procedure and how things ought to be orderly. But, yeah, he's not happy.

A couple things I just want to stress. I'm not going to take up too much time. The -- this is important because, obviously, there are a couple of historical examples like Central Park, Fairmount Park that are not in *Koons*, but the point that we're trying to make is -- and I'm not going to go through all of those. We've briefed all of their examples, it's in the papers, so I'm not going to waste the Court's time.

But importantly, the *Koons*' reasoning as to why the

State's examples don't help them, all applies to all of that. And that's really our point. The reasoning carries over to all of the examples that they give and all of the other places.

I want to make sure something doesn't get lost because we're talking about 13, 14, or 18 versus 19. There is a request in the TRO that the State has never commented on, never opposed, never argued, and that's the over-breadth issue, the multi-use property issue. They never commented on that.

And in addition to particular places that we believe it is unconstitutional to prohibit handguns, there's the problem -- it's the church problem. It's not just the church problem, but it's acute with the church plaintiffs. And by the way, there's never been any standing objection to the church plaintiffs, Mr. Varga and Ms. Cuozzo.

They're subject to a very unique problem, which is that -- and so is Mr. Siegel because he deals with the karate school and the rest of the strip mall. Everybody really has that problem, but Mr. Siegel and Ms. Cuozzo And Mr. Varga have a very acute problem here. They are prohibited from carrying in church because there is either actually a school, as in the case of Mr. Varga, because they have a large campus where there's a church building and a school over here that they lease to the academy, the christian academy. That's an actual school. It's easy to figure. We're not worried about that. We know that's a school.

And so that school makes the entire campus a prohibited area. That can't be consistent with *Bruen*. They can't carry in church because there's a school on the other side of the property. That's a huge problem.

Ms. Cuozzo has a related but slightly different problem, and that is that the church building is split up into Sunday School classes over here, the sanctuary where they pray over here, and maybe they have Bible study classes on certain days and they even have sports clinics. Actually, Mr. Varga's church has the sports clinics. The point is, the way it's drafted, any part of the property, parking lots, grounds, anywhere, that means that if there's a class being taught, arguably nobody in the church can defend the church.

That can't be constitutional. There's no way that's constitutional. And I don't want to --

THE COURT: But is that it? Because it's vague and overbroad, if those are your arguments, how do I enjoin? How are you asking me to enjoin? Right? And so that -- again, as we get into the layers of this --

MR. SCHMUTTER: It's more -- I am sorry, I apologize, Judge.

THE COURT: That's all right. But if plaintiffs' position is that, as drafted, the multi-use purpose is vague, and one of the arguments is that the statute is overbroad for multi-use, right, and/or the use of sporting events because

there's a school and acreage with different -- that's something for a TRO?

MR. SCHMUTTER: Absolutely, Judge, because -- so we don't -- it's not just a vagueness problem. So we have multiple issues. We think that's a Second Amendment problem because it's a prohibition on carry without historical tradition. Right?

So if schools, like real schools, like West Orange High School, Rutgers -- everybody knows that those count, right? So if those share property with something for which there's no historical tradition, there's no basis under *Bruen* to allow this prohibition to carry over to this use. That's the problem. So that's a straight-up Second Amendment problem that's really on all fours with the other ones. It's just a little bit unusual because of the way the statute is drafted in an overbroad fashion.

But what they're doing is they're leveraging, they're leveraging something that we haven't challenged on its face, right -- because it's an as-applied challenge. The multi-use property is an as-applied challenge really because we're not challenging schools or daycares on their face. But it's leveraging something we're not challenging on its face to prohibit places that they could not prohibit on their face per se if they had established -- you know, if they had a prohibition on pizza places, right -- because there was a

karate school here and a pizza place three doors down. They'd never be able to justify pizza places on their face, but they're prohibiting carrying in the pizza place because -- assuming the karate school counts. If the karate school counts as a school under the school portion of the statute, then they've prohibited the drugstore, the pizza place, the Wendy's, the shoe shop, and the tailor, none of which they can justify. That's a problem that's part of our TRO application.

So I don't want that to get lost, Judge. I just want to -- because the State has never mentioned that, they've never addressed that. They have steered clear of that because I don't think they have a good response to it, honestly, Judge.

There's something they're doing that really bears correction. Their theory is that -- and this is the numerosity problem. Their theory is that *Bruen* allows them to rely on a single or two or three examples if it was not challenged as unconstitutional and remained unchallenged in the law for whatever period of time. That is not how *Bruen* works.

Bruen requires tradition, and tradition clearly requires widespread practice. They do not get to say, well, Texas had a law back in whatever year it was, nobody challenged it, and therefore, that is now a tradition. That is not *Bruen*. And I urge the Court to not let them get away with that. That is completely not how *Bruen* works. That's a very important point.

THE COURT: Well, I think we're all trying to figure out how *Bruen* works.

MR. SCHMUTTER: Of course, Your Honor. And that's our position, that that's not correct, and so we ask that that position not prevail.

I think -- Your Honor, I think that's really all I needed to -- I just wanted to clarify a few of those things. Thank you.

THE COURT: Ms. Cai, do you want to be heard on this issue about the multi-use and the no response to it? I don't read it that you didn't respond to it, but if you wanted to put that on the record, then --

MS. CAI: Other than we did respond to it at least on standing grounds and that it's -- to note that this is an issue that's purely in this case. I have nothing else to say. Thank you.

THE COURT: Right. I think I'm going to take a brief recess. There's a few references that counsel, each of you made to other cases that escape me at this point. I want to make sure that my reading of those cases was consistent with what my plans are. That will be about 15 minutes. And to give my phenomenal court reporter a well-needed break.

So 15 minutes, tops. It's now -- it's now 3:12. So 3:30, we will resume.

THE COURTROOM DEPUTY: All rise.

MR. SCHMUTTER: Thank you, Judge.

(Brief recess at 3:12 p.m.)

(In open court at 3:37 p.m.)

THE COURTROOM DEPUTY: All rise.

THE COURT: All right. Good afternoon. You can all be seated.

So I have prepared and will enter a written opinion on the docket later today or tomorrow, but given where this case is, I'm also going to read it in the record so that you all leave here knowing next steps.

As for the temporary restraining order, the Court is aware and takes seriously its obligation to engage in the independent review and evaluation of the issues presented in matters pending before it. Here, the Court, however, cannot ignore the procedural posture of both this matter and *Koons* and how that bears on this Court's handling of important issues outlined in the pending motions.

On January 9th, 2023, Judge Bumb ordered that defendants, as well as their officers, agents, servants, employees, and attorneys, and any other person in active concert or participation with them are temporarily restrained from enforcing the following provisions of Chapter 131 of the 2022 Laws of New Jersey, Section (7)(a), subparts 12, 15, 17, and 24, and Subsection (7)(b)(1). Judge Bumb's Order was accompanied by a thorough Opinion addressing five identical

sensitive-place provisions at issue here.

This Court has reviewed Judge Bumb's Opinion and Order, the parties' submissions, including the supplemental submissions which address the impact of Judge Bumb's Opinion and Order on this matter and the relevant case law, and now having heard argument on the same, I find no reason to reach a different result on the five provisions of Chapter 131 already enjoined by Judge Bumb.

Additionally, the Court reserves on a decision on the additional sensitive places raised in this matter, because as to the motion for consolidation, the Court agrees that consolidation of Siegel into *Koons* is appropriate.

Pursuant to the Federal Rules of Civil Procedure 42, "If actions before the Court involve a common question of law or fact, the Court may join for hearing or trial any and all matters at issue in the action; two, consolidate the actions; or, three, issue any other orders to avoid unnecessary costs or delay." Federal Rule of Civil Procedure 42(a)(1) through (3).

"The Third Circuit recognized that this rule confers upon a District Court broad power, whether at the request of a party or upon its own initiative, to consolidate causes for trial, as may facilitate the administration of justice." Citing *April Denise Williams vs. USA*. Citation will be included in the written opinion and order.

"This power may also be exercised insofar as

consolidation would avoid unnecessary costs or delay. Consolidation does not merge this suit into a single cause or change the rights of the parties or make those who are parties in one suit parties in another." *In re: Community Bank of North Virginia*, 418 F.3d 277, 298, Note 12 (3d Cir. 2005).

"In considering a request to consolidate on one hand, the Court is mindful that two actions do not have to be identical, but could instead simply share common questions of law or fact." *In re: Cendant Corp. Litigation,* 182 F.R.D. 476, 478 (D.N.J. 1998).

"After all, the purpose of consolidation is to streamline and economize pretrial proceedings so as to avoid duplication of effort and to prevent conflicting outcomes in cases involving similar legal and factual issues." *CIMA Labs, Inc. vs. Actavis Group*, 2007 Westlaw 1672229 (D.N.J. 2007).

As initial matter, the Court is aware that generally cases consolidated are consolidated with the first-filed matter. This Court, however, has discretion to find contrary to the general rule and finds that the unique circumstances presented here require consolidation of the Siegel matter into the *Koons* matter.

The Siegel and *Koons* matters were virtually simultaneously filed, with the *Koons* complaint having been filed minutes before the Siegel complaint. The *Koons* matter has developed more than this matter and significantly so.

Judge Bumb issued a 60-page Opinion and Order enjoining enforcement of various provision of Chapter 131.

And today, although it's not clear, but it seems a preliminary injunction briefing schedule is soon to be decided. This dovetails into the other considerations regarding consolidation, the risk of conflicting outcome and judicial resources. The Court acknowledges the differences and the similarities in the *Koons* and Siegel matters; however, as it relates to the preliminary injunction proceedings, this Court must protect against the prospect of conflicting outcomes where, as here, both *Koons* and Siegel address the constitutionality of the same legislation against at least two identical defendants, Matthew Platkin and Patrick Callahan.

To be clear, the prospect of conflicting outcomes has thus far been avoided. Consolidation ensures it will not occur as these proceedings continue to develop in discovery and ultimately to finality.

Moreover, the burden on judicial resources is great. If these matters were to proceed before two different judges in this same district, the court simply lacks the time and resources for such waste. At this point, Judge Bumb has already expended more effort than this Court has on this matter, having considered and issued an Opinion and Order on the TRO issued in her matter. The parties will be burdened too.

As set forth above, the commonality of these two matters will lead to overlapping discovery requests, witnesses, and competing time frames from different judges. This Court is steadfast in avoiding that.

For all of these reasons, the defendants' motion to consolidate is granted in part and denied in part. The Court will consolidate the Siegel matter into the *Koons* matter, but the Siegel matter will consolidate -- I am sorry. I think I repeated that. The Court will consolidate the Siegel and *Koons* matter but -- so this is the denied part -- the Siegel matter will be consolidated into the *Koons* matter.

To the extent claims are still outstanding with respect to the temporary restraints, those are hereby reserved for further proceedings following the reassignment of this matter to Judge Bumb.

That is the ruling of the Court. Again, we do the best we can with what we're faced with.

Yes, Mr. Schmutter?

MR. SCHMUTTER: I am sorry, Judge. I just have a question. I just want to make sure I understood Your Honor's ruling.

Your Honor is entering a TRO on the five and then consolidating or not?

THE COURT: No, I'm not. This is all going -- I'm reserving on any TRO decision. It's all going to Judge Bumb.

But I wanted to be very clear so that when Judge Bumb reads this, she understands where I've landed, which is, I did not find a reason to disagree or depart from how she decided those five, but to the extent that those five have impact on the remaining claims, it's for her to decide.

MR. SCHMUTTER: Thank you, Judge. Thank you.

THE COURT: Anything further on behalf of plaintiff?

MR. SCHMUTTER: No, Judge.

THE COURT: Anything further on behalf of the State?

(No response)

THE COURT: Thank you all. Have a good day.

MR. SCHMUTTER: Thank you, Judge.

THE COURTROOM DEPUTY: All rise.

(Matter adjourned at 3:48 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Sharon Ricci, RMR, CRR
Official Court Reporter

January 12, 2023
Date